Filed 7/31/00; part. pub. order 8/11/00; Reposted with corrected publication instruction (see end of opn.)

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

| | |
|---|---|
| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>GREGG JAMES FERRIS,<br>Defendant and Appellant. | D033181<br><br>(Super. Ct. Nos. SCD138109, SCE190351) |

APPEAL from a judgment of the Superior Court of San Diego County, Larrie R. Brainard, Judge. Affirmed as modified.

Gregg James Ferris appeals a judgment following his jury convictions on two counts of possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1)),[1] one count of possession of a short-barreled shotgun (§ 12020, subd. (a)), one count of robbery (§ 211), and one count of possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)). Ferris contends: (1) the prosecutor committed misconduct in his closing argument; and (2) the trial court erred by (a) admitting

1 All statutory references are to the Penal Code unless otherwise specified.

evidence on his uncharged criminal conduct, (b) not instructing sua sponte with CALJIC No. 17.01, (c) not striking its findings that he had three prior serious or violent felony convictions, (d) imposing two restitution fines under each of section 1202.4, subdivision (b) and section 1202.45, and (e) not recognizing its discretion to impose concurrent terms for his offenses of possessing a controlled substance and possessing a firearm by a felon. We modify the judgment to impose only one restitution fine under each of section 1202.4, subdivision (b) and section 1202.45 and affirm the judgment as so modified.

FACTUAL AND PROCEDURAL BACKGROUND

At about 3 a.m. on June 22, 1998, Ferris was walking in the San Diego State University area. A police officer approached Ferris and questioned him. Ferris cooperated but appeared nervous. When the officer asked Ferris if the officer could search his backpack, Ferris expressed an expletive, handed the backpack to the officer, and ran away. The officer found a sawed-off shotgun and Ferris's parole identification card in the backpack.

At about 2:06 p.m. on July 28, 1998, Ferris entered the Grossmont Bank in Alpine and approached bank teller Rhonda Bardsley. Ferris handed her a note and a bank bag. The note instructed her to put all of her money into the bag and stated, "I have a gun. I'll shoot and kill you." The tan canvas bag had a piece of red reflective tape on it. Bardsley took the

bag, placed about $700 from her cash drawer in it, and handed it back to Ferris. Ferris took the bag and left the bank.

At about 6 p.m. on July 28, law enforcement officers arrived at the Carlton Oaks Country Club in Santee after learning Ferris was there. Unaware that Ferris had committed the bank robbery earlier that day, the officers sought Ferris on an outstanding warrant for the June 22 incident and a parole violation. When Ferris entered the hotel lobby, officers placed him under arrest. Officers found a .357-magnum pistol in the front waistband of Ferris's pants and a dagger and a small quantity of methamphetamine strapped to his ankle. Officers found a bank bag with red reflective tape on it in the car in which Ferris had arrived at the hotel.[2] They also found gloves, some cash, and a duffel bag in the car.

The information filed in case No. SCD138109 charged Ferris with the June 22, 1998, offenses of possession of a firearm by a felon and possession of a short-barreled shotgun. The separate information filed in case No. SCE190351 charged Ferris with the July 28, 1998, offenses of robbery, possession of a firearm by a felon, and possession of a controlled substance. Both informations alleged Ferris had two prior prison terms (§ 667.5, subd. (b)) and three prior "strike" convictions (§§ 667, subds.

---

[2] Bardsley later identified the bag as the one she saw during the robbery and identified Ferris as the bank robber.

(b)-(i), 1170.12).[3] The trial court granted the prosecutor's motion to consolidate the two cases for trial. The jury found Ferris guilty on all charges and, in a bifurcated trial, the trial court found the allegations were true. The trial court imposed a sentence of 105 years to life, consisting of 25 years to life in case No. SCD138109 for possession of a firearm by a felon, and consecutive terms of 25 years to life in case No. SCE190351 for each of the offenses of robbery, possession of a firearm by a felon, and possession of a controlled substance, and a consecutive term of 5 years for one of his prior serious felony convictions. The court also imposed two $10,000 restitution fines (§ 1202.4) and two $10,000 parole revocation restitution fines (§ 1202.45), suspending the latter fines unless parole was revoked.

Ferris timely filed a notice of appeal.

## DISCUSSION

### I

### *The Prosecutor Did Not Commit Misconduct in His Closing Argument*

Ferris contends the prosecutor committed misconduct in his closing argument by improperly appealing to the jurors' passions.

---

[3] The information filed in case No. SCE190351 also alleged Ferris had two prior serious felony convictions (§§ 667, subd. (a)(1), 1192.7, subd. (c)(18)).

A

Debra Erwin testified that on July 26, 1998, she rented a room at the Carlton Oaks Country Club for Ferris. On July 28 she told Ferris he needed to either leave the room or register it in his own name. Ferris got mad, told her to leave, and pointed a gun at her face. Erwin left the room.

In closing argument the prosecutor referred to that incident:

> "What you have in this case, ladies and gentlemen, I submit to you, is a case that is overwhelming both with the direct evidence and circumstantial evidence that has been presented to you. Mr. Ferris is guilty of all these charges. Mr. Ferris is a robber. Mr. Ferris is a methamphetamine user. Mr. Ferris is a felon [who] goes around with weapons, with handguns, and with sawed-off shotguns. What I submit to you is that Mr. Ferris is an extraordinarily dangerous man. One part of that that you saw in this case was testimony that was provided by Debra Erwin, who said on the night before the 27th [sic], Mr. Ferris was in the motel room when she confronted him about the amount of money it was costing, in fact, that she was having to pay for it, [and he] took a handgun and stuck it right in her face. That's Mr. Ferris. Mr. Ferris is not the man sitting there in the ski sweater. Mr. Ferris is the man with methamphetamine. He's the man with the sawed-off shotgun. He's the man who sticks the gun in the girl's face and threatens to blow her [head off]."

Ferris objected and moved to strike the prosecutor's "comment." The trial court overruled the objection. Outside the jury's presence, Ferris argued to the court:

> "[The prosecutor] in his closing comments referred to the defendant as someone who would hold a pistol to a young girl's face and threaten to blow her brains out, or words to that effect. Your honor, in our view this is misconduct on the part of [the prosecutor], whether intentional or not, because it highlights an aspect of the case which is only borderline relevant. We wondered why that was even brought in during his case-in-chief. We objected to the fact that he didn't [sic] point the pistol at her. I suppose the court felt his possession of the pistol was somehow relevant to these charges, but that evidence, along with the way [the prosecutor] characterized it in his comments a few moments ago, in our view, was prejudicial misconduct, and we're asking the court to admonish the jury to ignore that comment."

The trial court confirmed its ruling:

> "The testimony of the witness was allowed that he was doing that right around the time period of the offenses here, and that's why I allowed it in. And that was the testimony. Now, it was used in an inflammatory nature, and you can perhaps use that. But if you wish for me to say that to the jury, he's not accused of pointing the weapon at someone. But that fact was allowed in connection with the other offenses. I will -- but that's as far as I think I can go. And that's not something they're deciding one way or another. If that's the kind of admonition you're asking, I can do that. Beyond that, no."

The court refused Ferris's request that the jury be admonished that the prosecutor's comments were improper. The court explained: "It is in argument, and passion can be used in argument, and that's the way it is."

B

Ferris contends the prosecutor committed prejudicial misconduct in his closing argument by referring to the Erwin

incident in which Ferris pointed a gun at her head, and by arguing that Ferris was a dangerous man. Ferris asserts the prosecutor in effect argued he should be convicted because of his dangerous or violent character rather than because he committed the charged offenses. He also asserts the prosecutor improperly argued that he threatened to "blow [Erwin's] head off" when the evidence showed that he only pointed a gun at her face. Ferris argues the prosecutor thereby improperly appealed to the jurors' passions.

We conclude the prosecutor did not commit misconduct in his closing argument. His characterization of the Erwin incident as a threat by Ferris to blow her head off was a reasonable inference from the evidence. When Ferris pointed a gun at Erwin's head and told her to leave, it can be reasonably inferred that he was threatening to shoot her or, in slang or idiomatic language, to blow her head off. A prosecutor can properly argue inferences that can reasonably be deduced from the evidence. (*People v. Hill* (1998) 17 Cal.4th 800, 819; *People v. Rowland* (1992) 4 Cal.4th 238, 277; *People v. Ratliff* (1987) 189 Cal.App.3d 696, 702.)

Furthermore, the prosecutor did not commit misconduct by arguing that Ferris was a dangerous man. A prosecutor may vigorously argue his or her case and use colorful language and epithets that are supported by the evidence. (*People v. Ochoa* (1998) 19 Cal.4th 353, 463; *People v. Hill*, *supra*, 17 Cal.4th at

p. 819; *People v. Pinholster* (1992) 1 Cal.4th 865, 948 [permissible for prosecutor to refer to a witness as a "weasel" and to suggest another witness is a perjurer]; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1251 [permissible for prosecutor to refer to defendant as a "perverted maniac" and argue he is "very violent, a maniac"]; *People v. Villa* (1980) 109 Cal.App.3d 360, 364 [permissible for prosecutor to refer to defendant as an "animal"]; *People v. Rodriguez* (1970) 10 Cal.App.3d 18, 36-37 [permissible for prosecutor to refer to defendant as a "parasite on the community" because it was supported by the evidence]; *People v. Jones* (1970) 7 Cal.App.3d 358, 362 [permissible for prosecutor to argue defendant has "animalistic tendencies"].) The prosecutor's argument in this case was similar to the argument in *People v. Medina* (1995) 11 Cal.4th 694, at page 776, in which the prosecutor argued, "I cannot imagine anyone in our society being more violent and more dangerous" than the defendant. *Medina* concluded the prosecutor's argument was permissible because it was based on the evidence. (*Ibid*.) The prosecutor in *Medina* later argued during the penalty phase that the defendant was "a dangerous, uncontrollable person." (*Id*. at p. 777.) The court concluded that argument was permissible because it was fair comment on the evidence. (*Ibid*.) In this case the evidence showed Ferris possessed a sawed-off shotgun, robbed a bank, possessed methamphetamine, and pointed a gun at a woman's face. The

evidence supported a reasonable inference that Ferris was a dangerous man. Accordingly, the prosecutor's reference to Ferris as a dangerous man was permissible comment on the evidence in this case and did not constitute an improper appeal to the jurors' passions.

II

*Assuming Arguendo the Trial Court Erred by Admitting Evidence on Ferris's Prior Uncharged Criminal Conduct, That Error Was Harmless*

Ferris contends the trial court prejudicially erred by admitting evidence on the Erwin incident that showed prior uncharged criminal conduct.

A

Ferris repeatedly objected to admission of Erwin's testimony regarding the July 28, 1998, gun-pointing incident:

> "[Prosecutor:] Did [Ferris] point anything at you, Ms. Erwin?
>
> "[Defense counsel:] Objection. Relevance, your honor.
>
> "[Trial court:] Overruled.
>
> "[Erwin:] Yes.
>
> "[Prosecutor:] What did he point at you?
>
> "[Erwin:] A gun.
>
> "[Prosecutor:] He pointed it right at your face?
>
> "[Defense counsel:] Objection. Relevance, 352.
>
> "[Trial court:] Overruled.

"[Prosecutor:] He pointed a gun right at your face, didn't he?

"[Erwin:] Yes.

"[Prosecutor:] And he threatened to kill you; is that right?

"[Erwin:] He told me to get the . . . out.

"[Prosecutor:] And he pointed the gun at your face when he told you?

"[Erwin:] Yes.

"[Prosecutor:] Did you get out of the room? [¶] . . . [¶]

"[Erwin:] Yes."

B

Ferris asserts the trial court abused its discretion in admitting Erwin's testimony that Ferris pointed a gun at her face because that conduct was irrelevant to the charged offenses and should have been excluded under Evidence Code section 352.[4] Ferris argues that although the trial court properly could have allowed Erwin to testify that he possessed a gun, it erred by allowing her to testify that he pointed the gun at her face.

Assuming arguendo the trial court erred by admitting Erwin's testimony that Ferris pointed a gun at her face, we nevertheless conclude he does not carry his appellate burden to

---

[4] Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

show the error was prejudicial. Ferris asserts the assumed error was prejudicial because the gun-pointing evidence led the jury to perceive that he was a person inclined to commit gratuitous acts of violence and convict him out of fear he was a dangerous person. However, Ferris does not show it is reasonably likely that he would have received a more favorable result had the gun-pointing evidence been excluded. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Champion* (1995) 9 Cal.4th 879, 919.) The evidence of Ferris's guilt of the charged offenses was overwhelming. Regarding the June 22, 1998, charged offenses, Ferris was identified by the police officer as the person who handed him the backpack containing the sawed-off shotgun. Ferris's parole identification card was found in the backpack. Therefore, the evidence overwhelmingly showed Ferris possessed a short-barreled shotgun and possessed a firearm as a felon. Bardsley identified Ferris as the man who robbed the bank on July 28, 1998. When Ferris was arrested later that day, he possessed the bank bag with red reflective tape that was used in the robbery, a handgun and methamphetamine. The evidence overwhelmingly showed Ferris committed the robbery, possessed a firearm as a felon, and possessed a controlled substance. It is unlikely the jury convicted Ferris of any of the charged offenses because he pointed a gun at Erwin's face or because it believed he was a dangerous person. In consideration of the entire record, we conclude it is not reasonably probable Ferris

would have received a more favorable result had the gun-pointing evidence been excluded.

III

*The Trial Court Was Not Required to Instruct Sua Sponte with CALJIC No. 17.01*

Ferris contends the trial court prejudicially erred by not instructing sua sponte with CALJIC No. 17.01[5] that the jurors must unanimously agree on the act that constituted the July 28, 1998, offense of possession of a firearm by a felon. He asserts there were four separate acts on which jurors could have relied in finding that on or about July 28, 1998, he possessed a firearm as a felon: (1) the night of July 27 when Tammy Johnson saw him with a gun; (2) on July 28 when Erwin saw him with a gun; (3) during the bank robbery when his note stated he had a gun; and (4) on his arrest on July 28 when officers found a .357-magnum pistol in the waistband of his pants. Because jurors could have found any of those four acts constituted his

---

[5] CALJIC No. 17.01 states: "The defendant is accused of having committed the crime of _____ [in Count ___]. The prosecution has introduced evidence for the purpose of showing that there is more than one [act] [or] [omission] upon which a conviction [on Count ___] may be based. Defendant may be found guilty if the proof shows beyond a reasonable doubt that [he] [she] committed any one or more of the [acts] [or] [omissions]. However, in order to return a verdict of guilty [to Count ___], all jurors must agree that [he] [she] committed the same [act] [or] [omission] [or] [acts] [or] [omissions]. It is not necessary that the particular [act] [or] [omission] agreed upon be stated in your verdict."

possession of a firearm by a felon, Ferris argues CALJIC No. 17.01 should have been given sua sponte by the trial court.

*People v. Melhado* (1998) 60 Cal.App.4th 1529, at page 1534, set forth the general rule for the circumstances in which a unanimity instruction is required:

> "When an accusatory pleading charges the defendant with a single criminal act, and the evidence presented at trial tends to show more than one such unlawful act, *either the prosecution must elect the specific act relied upon to prove the charge to the jury, or the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act*. [Citation.] The duty to instruct on unanimity when no election has been made rests upon the court sua sponte. [Citation.]" (Italics added.)

No unanimity instruction is required when the prosecutor elects the specific act on which the charged offense is based. (*Ibid*.) "The alternative to giving the jury a unanimity instruction is for the prosecution to elect a single act for each charge." (*People v. Diaz* (1987) 195 Cal.App.3d 1375, 1381.) In *Diaz*, the prosecution did not formally elect which act constituted the charged offense and the trial court did not instruct with CALJIC No. 17.01. (*Ibid*.) However, the prosecutor "made an election in his opening statement to the jury tying each specific count to specific criminal acts elicited from the victims' testimony. Hence, the prosecution did make an election in this case." (*Id*. at p. 1382.) *Diaz* also noted the defendant had a meaningful opportunity to prepare a defense against the specific act and

charge because the prosecutor's election was reflected in the evidence at the preliminary hearing. (*Id*. at pp. 1382-1383.) *Diaz* concluded:

> "As long as a criminal defendant has the meaningful opportunity to prepare a defense to specific acts, as the defendant did here, no meaningful purpose would have been served in forcing this prosecutor to make an election at the beginning of the trial. The prosecution in the instant action never wavered from the evidence presented at the preliminary hearing." (*Id*. at p. 1383.)

Accordingly, CALJIC No. 17.01 was not required and the court affirmed the defendant's conviction. (*Ibid*.)

In this case the prosecutor effectively elected which act on or about July 28, 1998, constituted the charged offense of possession of a firearm by a felon. In his opening statement the prosecutor described Ferris's arrest on July 28, 1998: "[Officers] took [Ferris] into custody and he was handcuffed, and eventually taken out of the lobby. When he was detained and when he was arrested -- when he walked into the lobby, Mr. Ferris had a loaded 357 caliber handgun stuffed in the waist of his pants. This is the gun, this is the gun that he had with him on the 28th of July. *This gun, if you will, is the second count of a violation of felon in possession of a firearm*. This gun was fully loaded." (Italics added.) The prosecutor did not refer in his opening statement to the other three acts during which Ferris purportedly possessed a firearm. Therefore, the

prosecutor clearly elected in his opening statement the specific act on which he relied for the charged offense of possession of a firearm by a felon; he relied on the pistol found in the waistband of Ferris's pants at the time of his July 28, 1998, arrest. This election was made during Ferris's preliminary examination when the arresting officer testified that Ferris was in possession of a firearm at the time of his arrest in the lobby of the Carlton Oaks Country Club. The officer testified that Ferris had a gun in his waistband at the time of his arrest. Therefore, Ferris had a meaningful opportunity to prepare a defense to the charged offense of possession of a firearm by a felon and the prosecutor effectively elected in his opening statement which act constituted the charged offense.

We also note that in closing argument the prosecutor again referred to that specific act as the basis for the charged offense. The prosecutor argued: "Now, the second case, if you will, that is involved in this trial, dispensing rather quickly with the possession of the handgun [charge] since it was similar to the shotgun [possession charge], although this was recovered from [Ferris] directly [by the arresting officer] in the lobby . . . . [The charge] is that he's an ex-felon or convicted felon . . . in possession of a loaded firearm." In rebuttal argument, the prosecutor argued: "Now, there's no explanation, of course, for the pistol that was in the defendant's possession on the 28th when he was arrested in the hotel lobby. None at

all. I assume [that charged offense is] conceded." Furthermore, the trial court instructed the jury with CALJIC No. 17.50 that "all twelve jurors must agree to each decision." Therefore, the jurors were instructed on the general requirement that they must unanimously agree on a particular offense.

Because the prosecutor elected which act constituted the charged offense of possession of a firearm by a felon, we conclude the trial court was not required to instruct sua sponte with CALJIC No. 17.01. (*People v. Diaz*, *supra*, 195 Cal.App.3d at pp. 1381-1383.) Ferris's cited cases, including *People v. Crawford* (1982) 131 Cal.App.3d 591 and *People v. Wesley* (1986) 177 Cal.App.3d 397, are inapposite.

IV

*The Trial Court Did Not Abuse Its Discretion by Not Striking Its Findings on Ferris's Prior Serious or Violent Felony Convictions; Ferris's Sentence Is Not Cruel and Unusual*

Ferris contends the trial court abused its discretion by not striking its findings on his prior serious or violent felony convictions and that his sentence is cruel and unusual in violation of the Eighth Amendment to the United States Constitution.

A

The informations alleged that Ferris had three prior serious or violent 1992 residential burglary felony convictions within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12). The trial court found true the allegations

that Ferris was convicted of three prior serious or violent felonies. At his sentencing hearing, Ferris requested that in the furtherance of justice the trial court exercise its discretion and strike two of the three prior serious or violent felony conviction findings. He argued his criminal history was largely the result of his addiction to controlled substances and not a particularly violent one, and a sentence of 34 years would be sufficient punishment. The trial court denied Ferris's request, stating:

> "Well, I do find Mr. Ferris a tragic case. Someone who can't claim a deprived background. He certainly had his appropriate chances in life, and at the age of 30 has put himself in this circumstance. But I am mindful not only of his criminal history, but the fact that in each of these offenses before me there was substantial availability of weapons, loaded weapons, ammunition and threats that they be used. In fact, very scary statements by Mr. Ferris on a couple occasions about he wished he was able to get to his gun and use it, and so forth.
>
> "I don't know whether that's bravado, but it is clear that I have no justification or basis in this case, with his record, with these offenses, which are armed robbery type offenses and so forth, to justify under the so-called Three Strikes law in the striking of these strikes, and the request that I do so strike them would be denied. Under the circumstances, I intend to follow the [probation officer's sentencing] recommendation."

The trial court applied the Three Strikes sentencing law and imposed a total term of 105 years to life.

B

A trial court has discretion under section 1385, subdivision (a)[6] to dismiss or strike a prior serious or violent felony conviction allegation or finding. (*People v. Williams* (1998) 17 Cal.4th 148, 158-161; *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530-531.) *Williams* stated:

> "[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, 'in furtherance of justice' pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams*, *supra*, at p. 161.)

We conclude the trial court did not abuse its discretion by deciding not to strike its findings that Ferris had three prior serious or violent felony convictions. Prior to the instant offenses, Ferris had a history of criminal recidivism, including vehicle theft, trespass, narcotics violation, forgery, public nuisance, theft, three residential burglaries, and battery by a

---

[6] Section 1385, subdivision (a) provides in pertinent part: "The judge or magistrate may . . . of his or her own motion . . . , and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal must be set forth in an order entered upon the minutes. . . ."

prisoner convictions. His incarcerations in jail and prison for those prior offenses did not deter him from committing the instant offenses. Ferris had been released from prison only three months before he committed the instant offenses. Furthermore, as the trial court noted, Ferris had loaded weapons available to him during the commission of the instant offenses and he threatened to use them. Contrary to Ferris's assertion, the fact that he did not use those weapons, brutalize victims or resist police does not show that the nature and circumstances of the instant offenses fall without the spirit of the Three Strikes law. Because Ferris possessed loaded weapons during the commission of the instant offenses, there existed the imminent possibility that he would use them and resort to violence. His history of substance abuse similarly does not preclude application of the Three Strikes law. The trial court noted it had read the probation officer's reports. Those reports discussed Ferris's history of substance abuse and other personal difficulties, including his diagnosed bipolar disorder. Therefore, the court was aware of Ferris's background, character, and prospects before deciding not to strike its findings on his prior serious or violent felony convictions. The court did not abuse its discretion by not striking those findings and by applying the Three Strikes law in this case.

C

Although Ferris additionally asserts his aggregate 105-year sentence is cruel and unusual and violates the Eighth Amendment to the United States Constitution, he presents no substantive argument on that assertion and therefore does not carry his appellate burden to show his punishment was unconstitutional. Ferris summarily argues only that the sentence imposed by the trial court "is excessive, unreasonable, disproportionate." Therefore, we need not discuss the substance of his assertion. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214, fn. 11; *People v. Callegri* (1984) 154 Cal.App.3d 856, 865, disapproved on other grounds in *People v. Bouzas* (1991) 53 Cal.3d 467, 477-478.) In any event, we conclude an aggregate 105-year sentence is not excessive, does not shock the conscience, and is not cruel and unusual punishment in consideration of the circumstances of this case, including the nature of the instant offenses and Ferris's recidivist behavior. (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196; *People v. Diaz* (1996) 41 Cal.App.4th 1424, 1431.) Ferris's sentence therefore does not violate the Eighth Amendment to the United States Constitution.

V

*The Trial Court Improperly Imposed Multiple Restitution Fines*

Ferris contends the trial court imposed an unauthorized sentence when it imposed two section 1202.4, subdivision (b)[7] and section 1202.45[8] restitution fines.

A

An information was filed against Ferris for the June 22, 1998, charged offenses and a separate information was filed against him for the July 28, 1998, charged offenses. The informations had separate case numbers: SCD138109 and SCE190351. Citing section 954,[9] the prosecutor filed a motion to

---

[7] Section 1202.4, subdivision (b) provides: "In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record. [¶] (1) The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, but shall not be less than two hundred dollars ($200), and not more than ten thousand dollars ($10,000), if the person is convicted of a felony . . . ."

[8] Section 1202.45 provides: "In every case where a person is convicted of a crime and whose sentence includes a period of parole, the court shall at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4. This additional restitution fine shall be suspended unless the person's parole is revoked."

[9] Section 954 provides in pertinent part: "An accusatory pleading may charge two or more different offenses connected

consolidate the two cases for trial. When the trial court referred to the prosecutor's motion as "a motion to consolidate these cases," the prosecutor replied: "I filed a motion for joinder of the two cases for trial purposes. I don't know if consolidation is exactly the right phrase." The trial court granted the motion. The court noted the two cases "certainly would have been filed in a joint information, or complaint and then information, but for the fact that one didn't know about the other until later." The informations thereafter were not formally consolidated and the jury's verdicts on the June 22 and July 28, 1998, charged offenses bore separate case numbers. Furthermore, separate probation officer's reports were prepared. At sentencing the trial court ordered Ferris "[t]o pay a restitution fine pursuant to [section] 1202.4 of the Penal Code in the amount of $10,000 in each of the two cases, to be paid forthwith or as provided in Penal Code section 2085.5. [¶] He's to pay an additional fine pursuant to [section] 1202.45 of the Penal Code of $10,000 to be suspended and remain so unless the defendant's parole is revoked. And that is in each case."

---

together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and *if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated*. . . ." (Italics added.)

B

Ferris asserts that the imposition of restitution fines in both cases constituted an unauthorized sentence because the two cases had been consolidated. Restitution fines under sections 1202.4, subdivision (b) and 1202.45 are limited to an amount of $10,000 each. (*People v. Rowland* (1997) 51 Cal.App.4th 1745, 1752.) Ferris asserts the trial court erred by considering the two cases as separate for purposes of sections 1202.4, subdivision (b) and 1202.45 and improperly imposed restitution fines thereunder of $20,000 each.

Joinder and consolidation are often used interchangeably because they have the same effect of a joint trial of multiple charges. *People v. Ochoa, supra,* 19 Cal.4th 353 shows this commonality:

> "Because consolidation ordinarily promotes efficiency, the law prefers it. 'Joinder of related charges, whether in a single accusatory pleading or by consolidation of several accusatory pleadings, ordinarily avoids needless harassment of the defendant and the waste of public funds which may result if the same general facts were to be tried in two or more separate trials [citation], and in several respects separate trials would result in the same factual issues being presented in both trials.' (*People v. Brock* (1967) 66 Cal.2d 645, 655 [58 Cal.Rptr. 321, 426 P.2d 889].) Thus '[a] defendant can prevent consolidation of properly joined charges only with a "clear showing of prejudice" . . . .' (*People v. Mason* [(1991) 52 Cal.3d 909, 935].)" (19 Cal.4th at p. 353, fn. omitted.)

Any linguistic distinction between the terms joinder and consolidation is irrelevant in the circumstances of this case because it is clear that Ferris was substantively tried and sentenced in one joint case.

In *People v. McNeely* (1994) 28 Cal.App.4th 739, we addressed a similar situation. McNeely entered guilty pleas to various charged offenses in two cases with separate case numbers. (*Id*. at pp. 742-743.) At the same sentencing hearing, the trial court sentenced McNeely in both cases and ordered him to pay $93,000 in restitution under [former] Government Code section 13967, subdivision (c). (*Id*. at p. 743.) We stated:

> "While a trial court can separately sentence a defendant on different cases at a single hearing [citation], here the court combined the charges in both cases in imposing the prison term and ordering restitution. We do not believe this creates separate sentencing proceedings on the two cases. When a penal statute is ambiguous, it must be construed in the light most favorable to the defendant. [Citation.]" (*Id*. at pp. 743-744.)

Accordingly, we concluded the restitution order was limited to $10,000 and modified the judgment to reflect that limitation. (*Id*. at p. 744.)

We conclude this case is similar to *McNeely*. The provisions of both section 1202.4, subdivision (b) and section 1202.45 apply "[i]n *every case* where a person is convicted of a crime." (Italics added.) Those statutes do not specify whether the phrase "every case" means every separately charged and

numbered case or every jointly tried case. When a penal statute is ambiguous, we adopt the construction that is more favorable to the defendant. (*People v. McNeely*, *supra*, 28 Cal.App.4th at p. 744.) Accordingly, in this case we adopt the statutory construction that is favorable to Ferris. We conclude the phrase "every case" in sections 1202.4, subdivision (b) and 1202.45 includes a jointly tried case although it involves charges in separately filed informations. The trial court granted the prosecutor's motion to join the charges for purposes of trial. Therefore, the charges in the separate informations were effectively joined in one case despite any technical retention of separate case numbers. Accordingly, in this case the trial court erred by imposing restitution fines in "both cases." To allow separate restitution fines in a case involving separate informations but joint trials and sentencing could lead to prosecutorial abuse.[10] We modify the judgment to order Ferris to pay one $10,000 fine under section 1202.4, subdivision

---

[10] For instance, adoption of the People's position presumably would have allowed the trial court to impose five separate restitution fines had the prosecutor strategically chosen to include only one charged offense in each of five separate informations, despite conducting a joint trial of all charged offenses. Such a choice of form over substance should not be condoned.

(b) and one $10,000 fine, suspended unless his parole is revoked, under section 1202.45.[11]

VI

*The Trial Court Recognized Its Discretion to Impose Concurrent Terms*

Ferris contends the trial court erred by imposing consecutive terms for his offenses under section 12021 and Health and Safety Code section 11377 because it did not recognize it had discretion to impose concurrent terms for each conviction.[12]

A

The probation officer's report in case no. SCE190351 stated: "Counts two [§ 12021, subdivision (a)(1) (possession of a firearm by a felon)] and three [Health & Saf. Code, § 11377, subdivision (a) (possession of a controlled substance)] occurred on the same occasion and therefore may be sentenced concurrently per [*People v. Hendrix* (1997) 16 Cal.4th 508, 512-513)]. However, consecutive sentencing is recommended as the crimes in

---

[11] The People cite *People v. Smith* (1992) 7 Cal.App.4th 1184 as support for their position. However, *Smith* is inapposite because it involved separate case numbers and the separate cases were not consolidated or joined for trial, sentencing, or otherwise. (*Id*. at p. 1189.) In *Smith*, we concluded the charges against the defendant were "brought and tried separately" for purposes of section 667, subdivision (a). (*Id*. at pp. 1189-1193.)

[12] Ferris apparently concedes that the terms imposed for those offenses were required to be consecutive to the term imposed for his robbery offense (§ 211).

these two counts had predominantly different objectives ([Cal. Rules of Court,] [r]ule 425(a)(1))." At Ferris's sentencing, the trial court stated: "I have read and considered the report from the probation department, the records and files herein." The probation officer's report in case No. SCE190351 bears the trial judge's signature, representing he had "read and considered the foregoing report." In sentencing Ferris, the trial court stated that it "intend[ed] to follow the [probation officer's] recommendation." It then imposed consecutive sentences of 25 years to life for each of Ferris's convictions under section 12021 and Health and Safety Code section 11377 in case No. SCE190351. After imposing restitution fines, the trial court stated: "All custody to be consecutive as required by law."

B

Ferris asserts that the trial court must have believed it did not have discretion to impose concurrent terms for the two possession offenses because it stated that all custody was to be consecutive "as required by law." Although the record arguably could be interpreted in that manner if the trial court made only that statement, the entire record shows the court was aware of its discretion to impose concurrent terms. The trial court expressly acknowledged it had read and considered the probation officer's report. That report stated that concurrent terms were possible, but that consecutive terms were recommended. We infer

the trial court was aware of its discretion to impose concurrent terms because it read, considered and followed the probation officer's report. We assume the trial court's statement that "all" custody was to be consecutive as "required by law" referred to sentences it imposed for other offenses. Accordingly, the trial court properly exercised its discretion by imposing consecutive terms for Ferris's offenses under section 12021 and Health and Safety Code section 11377.

DISPOSITION

The judgment is modified to provide imposition of a Penal Code section 1202.4, subdivision (b) restitution fine of $10,000 and a Penal Code section 1202.45 parole revocation restitution fine of $10,000, which is suspended unless parole is revoked. The judgment is affirmed as modified. The superior court is directed to prepare an amended abstract of judgment to reflect this modification and shall notify the Department of Corrections of the modification.

McDONALD, J.

WE CONCUR:

HUFFMAN, Acting P. J.

HALLER, J.

Filed 8/11/00

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

| | |
|---|---|
| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>GREGG JAMES FERRIS,<br>Defendant and Appellant. | D033181<br><br>(Super. Ct. Nos. SCD138109, SCE190351) |

THE COURT:

The opinion filed July 31, 2000, is ordered certified for publication with the exception of parts I, II, III, IV and VI.

The attorneys of record are:

Jerome P. Wallingford, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Steven T. Oetting and Craig S. Nelson, Deputy Attorneys General, for Plaintiff and Respondent.

HUFFMAN, Acting P. J.

Copies to: All parties